



Tribunals Service
Information Tribunal

Information Tribunal

Appeal Number: EA/2007/0089
Promulgation Date: 22 April 2008

Freedom of Information Act 2000 (FOIA)

Decision reached on consideration of the papers alone

BEFORE

INFORMATION TRIBUNAL DEPUTY CHAIRMAN
DAVID MARKS
And
LAY MEMBERS
ROGER CREEDON
JOHN RANDALL

Between

MR JOHN ANDREW ALLISON

Appellant

and

INFORMATION COMMISSIONER

Respondent

and

HM COMMISSIONERS FOR REVENUE AND CUSTOMS

Additional Party

Decision

The Tribunal dismisses the Appellant's appeal and upholds the Decision Notice issued by the Information Commissioner dated 2 August 2007

Reasons for Decision

Introduction

1. This case deals with the not untypical request made by parties who are as much concerned with the reasons behind a decision or series of decisions made by a public authority as they are with the disclosure of the information which they seek. The risk is that by confusing these objectives, the disclosure which is sought goes beyond the strict confines of the Freedom of Information Act 2000 ("FOIA"). Much as the sympathy of the Tribunal might be engaged in a particular case with the motives underlying that request, the Tribunal remains, as does the Information Commissioner ("the Commissioner"), tied to the relatively narrow provisions of FOIA which are concerned only with the request for "information" as that term is defined and treated in the statute.
2. Although treatment of requests for information under FOIA is what is sometimes called "applicant-blind" (in the sense that reasons underlying requests are ignored for the purposes of FOIA) the Appellant's motives in this case are apparent from the terms of his original request dated 12 April 2005. In it he refers to the fact that all his personal pension funds were transferred from The Equitable Life Assurance Society into a pension scheme administered by Scottish Mutual Assurance ("Scottish Mutual") on or about 21 June 2001. Events regarding Scottish Mutual as a pension provider caused the Appellant great concern in the two year period leading up to his request and as he puts it in his letter of request, since that time: "... I have been trying to establish the nature and extent of the trusteeship operated by Scottish Mutual in the management of these pension funds ...". In particular the Appellant expressed his failure to reconcile the terms of the relevant Trust Deed as approved by the Inland Revenue being the Additional Party in this appeal and what he called the Standard Provisions of the Income Withdrawal Plan which according to the Appellant had not been approved by the Additional Party.

The Request

3. In his letter of request, the Appellant sought the answers to the following questions, namely:
 - "1. Since the coming into force of SI 2001/117 on 6 April 2001, what application has been made on behalf of Scottish Mutual for approval of its Income Withdrawal Plan as presently constituted?
 2. What approval has been given by the Inland Revenue to that Scheme in terms of SI 2001/117 and to what pension policy documentation did that approval relate?

3. In the event that no approval has been given as regards question 2 above to the Standard Provisions, would any application now to the Inland Revenue for a scheme which includes as a governing instrument the Standard Provisions of the Income Withdrawal Plan in its present form be granted?
 4. Does the contradiction of Clauses 8 and 9 of the approved Deed of Trust by the Standard Provisions at clause 2(i)c nullify the approval given by the Board of Revenue to the Deed of Trust?
 5. In the event that approval is not and would not be given to a scheme which incorporates the said Standard Provisions in its present form, is the said Plan as constituted by the Deed of Trust and said Standard Provisions as governing instruments no longer an approved pension arrangement in terms of the relevant statutes.
 6. Is the said scheme as so constituted now “unauthorised”?
 7. Does the Revenue provide model wording for the governing instruments in such pension schemes, and has it done so in this case where its approval has been obtained?”
4. In the Commissioner’s subsequent Decision Notice, the seventh question was broken into two parts, namely:
- “(a) Does the Revenue provide model wording for the governing instruments in pension schemes,
 - (b) And has it done so in this case where its approval has been obtained?”
5. In its initial written response dated 16 May 2005, the Additional Party contended that the tax affairs of a pension scheme were confidential so that what was called “the majority of the information that you have requested” cannot be provided on the basis of confidentiality. The reasons for non-disclosure were set out in a Schedule appended to the letter in which reliance was placed predominantly on section 44 of FOIA and sections 18 – 20 of the Commissioners for Revenue and Customs Act 2005 (“the 2005 Act”). Further details of these provisions will be set out below. The only information that could be disclosed was the information sought in question 7(a). In addition, the information sought under question 3 was not held by the Additional Party.
6. By letter dated 19 May 2005, the Appellant sought an internal review. In that letter he said that he would seek the consent of Scottish Mutual which he claimed would dis-apply sections 18 – 20 of the 2005 Act. He also stated that he was seeking to establish:

“.. grounds of action and availability of evidence for court action against Scottish Mutual Assurance relating to my pension policy.”

It appears that the Appellant has as at the date of the Tribunal's decision at least, still not instituted such proceedings.

7. In its reply of 9 June 2005, the Additional Party confirmed its earlier decision. In its letter and in a paragraph subsequently quoted by the Commissioner in the Commissioner's Decision Notice, the Additional Party stated:

“The primary purpose of this Office is to approve pensions schemes, both occupational and personal pension schemes, for tax purposes and to ensure that they are administered in a manner consistent with that approval status.”

8. The term “this Office” is a reference to the Audit & Pensions Schemes Services (“APSS”) which at the relevant time was a division within the Additional Party. Further reference will be made to the functions of the APSS and its successor in due course below. It is perhaps appropriate at this stage to refer to SI 2001 No. 117 being the statutory instrument referred to by the Appellant in his original request. The full title of the statutory instrument is The Personal Pension Schemes (Restrictions on Discretion to Approve) (Permitted Investments) Regulations 2001. The Tribunal feels it unnecessary to quote from this statutory instrument's provisions save to note that according to its Explanatory Note the Regulations are described as imposing “restrictions on the Board of Inland Revenue's discretion to approve a personal pension scheme by restricting the investments in which the scheme may invest”.

Section 44 and the 2005 Act

9. Section 44 of FOIA provides as follows, namely:

“(1) Information is exempt information if its disclosure (otherwise than under this Act) by the public authority holding it –

(a) is prohibited by or under any enactment ...”

10. Section 18 of the 2005 Act provides:-

“18. Confidentiality

(1) Revenue and Customs officials may not disclose information which is held by the Revenue and Customs in connection with a function of the Revenue and Customs.

(2) But subsection (1) does not apply to a disclosure –

- (a) which –
 - (i) is made for the purposes of a function of the Revenue and Customs, and
 - (ii) does not contravene any restriction imposed by the Commissioners,

- (c) which is made for the purposes of civil proceedings (whether or not within the United Kingdom) relating to a matter in respect of which the Revenue and Customs have functions,

- (e) which is made in pursuance of an order of a court,

- (h) which is made with the consent of each person to whom the information relates.”

Section 19 provides in relevant part:-

“19. Wrongful Disclosure

- (1) A person commits an offence if he contravenes section 18(1) or 20(9) by disclosing revenue and customs information relating to a person whose identity –
 - (a) is specified in the disclosure, or
 - (b) can be deduced from it.
- (2) In subsection (1) “revenue and customs information relating to a person” means information about, acquired as a result of, or held in connection with the exercise of a function of the Revenue and Customs (within the meaning given by section 18(4)(c)) in respect of the person; but it does not include information about internal administrative arrangements of Her Majesty’s Revenue and Customs (whether relating to Commissioners, officers or others)”.

Section 23 provides:

“23. Freedom of Information

- (1) Revenue and Customs information relating to a person, the disclosure of which is prohibited by section 18(1), is exempt information by virtue of section 44(1)(a) of the Freedom of Information Act 2000 (c. 36) (prohibitions on disclosure) if its disclosure -
 - (a) would specify the identity of the person to whom the information relates, or
 - (b) would enable the identity of such a person to be deduced.
- (2) Except as specified in subsection (1), information the disclosure which is prohibited by section 18(1) is not exempt information for the purposes of section 44(1)(a) of the Freedom of Information Act 2000.
- (3) In subsection (1) "revenue and customs information relating to a person" has the same meaning as in section 19."

The Appellant's Complaint to the Commissioner

11. The Appellant lodged a formal complaint with the Commissioner dated 12 June 2005. Among the earlier exchanges between those parties, the Commissioner pointed out that with regard to questions 3 and 4, as well as questions 5 and 6, his initial view was that those questions were speculative or hypothetical or ones in which an opinion was sought as distinct from their constituting requests for information within the narrow sense described by FOIA. He confirmed however that he required further clarification as to question 7(b).
12. The Commissioner wrote to the Additional Party asking that Party whether it had sought consent from Scottish Mutual to the disclosure sought and in particular he asked the Additional Party with regard to questions 3, 4, and 5 what information, if any, the Additional Party held.
13. In continuing exchanges between the Appellant and the Additional Party, the Appellant confirmed that the material supplied to him by the Additional Party appeared to answer questions 1 and 2.
14. The Tribunal feels there is no need to refer to very much more in the exchanges between the three parties to this appeal which took place in the period leading up to the Commissioner's Decision Notice, save to point out that despite the Appellant's firm contention that he did obtain the relevant consent in order to satisfy the provisions of section 18(2)(h) of the 2005 Act, such consent was not, at least in the views of the Commissioner and of the Additional Party, ever in the event obtained.

15. Somewhat regrettably these exchanges lasted the best part of two years covering the period from the Appellant's original complaint to the Commissioner in June 2005 to the continued reassertions by the Additional Party in its letter of 19 June 2007 to the Commissioner that a letter obtained from a company known as Resolution (which by May 2007 was the parent company of Scottish Mutual) did not allow the Additional Party to answer the original questions.
16. The Tribunal fully accepts that the Appellant was naturally concerned about possible or actual prejudice to his pension fund. However, his desire to contemplate proceedings against Scottish Mutual had no relevance to his request at least in the absence of a clear application of section 18(2)(c) (civil proceedings) and/or (e) (court order), neither of which provision was applicable at the time of the request (which is the only relevant time for present purposes) or even beyond.

The Decision Notice

17. The Decision Notice is dated 2 August 2007. In it, the Commissioner sets out in detail the relevant chronology which has been set out in much more brief terms above. At paragraph 50, the Commissioner observes that throughout the course of the investigation, the Appellant had made it clear that the purpose of his request was to try to establish if the Scottish Mutual Pension Scheme and its rules complied with and have always complied with certain provision of the Taxes Acts. The same paragraph also noted that the Appellant had pointed out to the Commissioner a number of changes which had taken place in the approval of pension schemes since his original request asking the Commissioner to consider these in his investigation. However, the Commissioner had, in the Tribunal's view, quite rightly, stated very firmly that he could only investigate the handling of the request at the time the request was made. The Tribunal pauses here to note that the "consent" letter supplied by Scottish Mutual dated 5 March 2007 was not available to the Additional Party at the time the Additional Party answered the original request.
18. In paragraph 51, the Commissioner summarised what he called the "recorded" information relevant to the Appellant's original request, namely the application for approval of the pension scheme dated 15 April 1996, the application for an appropriate scheme certificate dated 15 April 1998, the original Trust Deed and rules also dating from 1996, together with the amended Trust Deeds and rules dated 21 April 1997 and 12 March 2004 respectively.
19. At paragraph 54, the Commissioner confirmed that prior to 6 April 2006, the role of the APSS was to approve pensions schemes for tax purposes and to ensure that they were administered in a manner consistent with what was called "that approval status". The

- Commissioner observed that for the purpose of that function the relationship between a pension provider and the Additional Party was the same as that between the Additional Party and an ordinary tax payer insofar as approval was concerned given the need to respect the appropriate confidentiality.
20. At paragraph 56 of the Decision Notice, the Commissioner stated that he was satisfied that the information held by the Additional Party was obtained under one of its functions within the meaning and spirit of section 18 and following of the 2005 Act in respect of any information that had been requested by the Appellant. At paragraph 58, the Commissioner considered section 18(2)(a) of the 2005 Act. The Commissioner referred to an earlier decision of the Tribunal, namely *Slann v Financial Services Authority* (EA/2005/0019) in which the Tribunal had considered in a somewhat different statutory context, namely sections 348 and 349 of the Financial Services and Markets Act 2000 (FSMA), a provision that for the purposes of information imparted to the Financial Services Authority, information is confidential if it was received by the Authority “for the purposes of, or in discharge of, any functions” of the Authority. Section 349 of the FSMA provided that section 348 did not prevent disclosure of confidential information which is “made for the purposes of facilitating the carrying out of a public function”. The term “public function” was defined and described by the relevant Regulations as including “functions conferred by or in accordance with any provisions contained in any enactment or subordinate legislation”.
 21. In the *Slann* decision the Tribunal felt that the term “public function” related to powers and duties conferred on the Financial Services Authority by legislation and not legislation such as FOIA itself to which the Authority as a public authority was otherwise subject. It followed that making a disclosure under FOIA did not constitute the carrying out of a public function. The Commissioner found that in paragraph 59 of his Decision Notice that effectively a disclosure under section 1(1) of FOIA did not constitute “a function” of the Additional Party.
 22. At paragraph 60 the Commissioner referred to section 18(2)(c) and section 18(2)(e) of the 2005 Act both of which provisions have been set out above. He referred to the indication expressed by the Appellant that he wished to have information disclosed to him in order to institute civil proceedings against Scottish Mutual. However, the Commissioner pointed out, again in the view of the Tribunal quite correctly, that any claim which the Appellant might make against a pension provider would not in itself necessarily relate to the functions of the Additional Party even if the information held by the Additional Party was necessary to or relevant for the prosecution of such a claim.
 23. In paragraph 61, the Commissioner made the point, again in the view of the Tribunal perfectly properly, that with regard to the need to seek consent for the purposes of

section 18(2)(h) of the 2005 Act, it was entirely clear that at the time the Appellant had made his original request, quite apart from any later period, no consent had been given. Moreover, section 18(2)(h) did not impose any obligation on the Additional Party to seek such consent.

24. The Decision Notice therefore determined that the Additional Party had dealt with the request in accordance with FOIA and that no steps needed to be taken.

The Notice of Appeal

25. The Notice of Appeal was received by the Tribunal on 29 August 2007.
26. The grounds of appeal revisit the reasons for the original request as well as various other matters. These other matters include complaints levelled against the Additional Party to the effect that it should have required Scottish Mutual to direct that pension assets be held in a particular way or that it should have declared that the scheme, as approved, should at a later stage no longer constitute an approved scheme. Such matters have no relevance at all to requests under FOIA.
27. Other complaints contained in the grounds of appeal include complaints about the length of time it had taken to deal with the request, as well as an alleged failure on behalf of the Commissioner in his Decision Notice to refer to certain documents. The Appellant also reiterates his intent to make a claim against “the pension provider” based on the fact that the approval for the scheme “has lapsed from the date of the Standard Provisions in 1998 ...”. Again, none of those matters bear any relevance to the correctness or otherwise of the Decision Notice.
28. The Tribunal agrees with the Commissioner as set out in the Commissioner’s Reply that taking the notice of appeal in the round, it appears to raise four grounds of appeal although there is some degree of overlap between at least two of them. They can be usefully summarised as follows:
 - (1) The first ground reflects an allegation that the Commissioner failed to deal with the exception set out in section 18(2)(c) of the 2005 Act;
 - (2) the second ground insofar as there is no overlap with the first ground, deals with the allegation that the Commissioner was under a “total misapprehension” as to section 18(2)(c) of the 2005 Act;
 - (3) the third ground revisits section 18(2)(h) with its allegation that the Commissioner failed to take into account the fact that consent to disclosure had been given to the Revenue by Scottish Mutual within the meaning of that provision; and

- (4) the fourth and final ground again reflects matters set out above, namely that the Commissioner had failed to refer to certain correspondence, in particular certain specific letters of complaint regarding the delay in dealing with the request and the subsequent complaint.

“Adjustments” to the Grounds of Appeal

29. Without any prior approval sought from or given by the Tribunal and in the absence of any direction, the Appellant lodged “adjustments” to his grounds of appeal. Although the Tribunal did admittedly subsequently give the other parties an opportunity to respond, this action was perhaps regrettable. The Appellant was limited to the grounds in his original appeal and could not amend them at least without the express permission to do so granted on behalf of the Tribunal.
30. However, erring on the side of generosity the Tribunal interprets these “adjustments” as merely amplification of the four grounds already referred to above. In particular, the Appellant disputing any contention that section 18(2)(c) only applied to “ongoing civil procedures already in court”. Secondly, if not in the alternative, the Appellant asserted that it “was not the function of [the Commissioner] to judge or pre-judge the prospects of success of the proposed action against [Scottish Mutual]”. Finally, the Appellant “formally” requested sight of “all correspondence, notes of telephone calls and meetings relating to [the Commissioner’s] communications with [the Additional Party]” during the course of the application. On no basis could such an application for further disclosure be treated or viewed as “any form of adjustment” to the Appellant’s grounds of appeal. In any event, the Tribunal never made any direction to that effect.

Reply of the Additional Party

31. Although the Additional Party quite properly filed a Reply in the light of the Tribunal’s initial directions dated 1 October 2007, the matters raised in that Reply in effect have been revisited in subsequent submissions and no further comment need be made here.
32. However, yet again in the wake of this Reply the Appellant thought fit to lodge further so-called “adjustments” to his notice of appeal. Again he had no strict right to do this and indeed additional directions issued by the Tribunal confirmed that. However, the Tribunal finds that no substantive alteration was made to the four grounds identified above at paragraph 28 and proposes to make no further reference to this document. Directions

dealing with all pre-appeal matters were then given by the Tribunal following a telephone direction hearing at which the Appellant himself attended.

The Function of the Tribunal

33. The appellate function of the Tribunal is by now well known and documented in a number of its decisions. It need only be briefly recapitulated for present purposes. The powers of the Tribunal in relation to appeals under section 57 of FOIA are set out in section 58. That section provides that the Tribunal shall allow an appeal if it considers that a Decision Notice is not in accordance with the law or that any discretion as exercised by the Commissioner should be exercised differently. In addition, the Tribunal can review findings of fact.
34. The starting point is always the relevant Decision Notice. Often the Tribunal receives and hears evidence on the appeal not previously made available to the Commissioner. Despite the apparent allegation of the Appellant to the contrary this is not a case in which factual findings are relevant save as to the questions of the “functions” of the Additional Party, to which reference will be made below. The real issue is in effect a question of mixed law and fact. Insofar as any factual issues are concerned, they are not matters on which the Appellant can, despite his belief, give evidence. As to the practical considerations stemming from the terms of sections 18 to 20 of the 2005 Act, insofar as those are contained in or otherwise touched upon by the Appellant’s grounds of appeal, these are questions of law.
35. This appeal concerns the applicability of the absolute exemption conveyed in section 44 of FOIA. No issues regarding the balance of competing public interests arise.

The Evidence

36. The only witness statement on the part of the Additional Party which is put before the Tribunal is that of Martyn Rounding, Head of Pensions Policy in Charity Assets and Residence, Pensions Services Scheme (“CAR PSS”). Mr Rounding has provided a statement dated 4 February 2008. He has been employed by the Additional Party for nearly 24 years and has been in his present post as Head of Pensions Policy for one year leading up to the date of his statement. He outlines the Additional Party’s functions with respect to pensions.
37. He confirms at paragraph 5 of his witness statement that at the time of the Appellant’s request, the division of the Additional Party which administered pensions functions was

- the APSS. In 2006 that division was renamed as PSS, ie the Pensions Services Scheme.
38. At paragraph 7 of his witness statement, Mr Rounding states:
- “A function of APSS at the time of the request (the relevant time) was the examination of applications for tax approval of personal pension schemes under the legislation set out above [*ie the Income and Corporation Taxes Act 1988*]; and, as required by the relevant legislation, to consider any further amendments to scheme rules which arose whilst the scheme was an approved personal pension scheme. This included ensuring that they were administered in a manner consistent with their tax exempt status”.
39. He therefore confirmed that information submitted to APSS by a personal pension scheme provider to obtain approval was submitted “in respect of a pensions function”. He then referred to the relevant guidance notes regarding making an application for approval under the relevant provisions of the Taxes Act noting that such guidance had been sent to the Appellant under cover of a letter dated 19 May 2006.
40. At paragraph 11, he confirmed that as the guidance notes themselves indicated, in considering an application for approval, the Additional Party would only require a fully completed application form, a copy of the Trust Deed and the Scheme Rules. He stressed that a specific provision made it clear that the Additional Party did not need to see copies of the policies or policy endorsements.
41. He then referred to SI 2001 No 117 being the statutory instrument noted above at paragraph 8. This statutory instrument advised scheme administrators and pension providers of revised model rules and he also noted that details of these provisions had again been sent to the Appellant under cover of the letter dated 19 May 2006.
42. Finally he stresses in paragraph 14 of his witness statement that it was “a matter for the scheme establisher and, if applicable, trustees to seek tax approval” from the Additional Party. In the words of Mr Rounding :
- “The function of the [*Additional Party*] was to decide in accordance with the relevant legislation, including SI 2001/117, whether the scheme was capable of being so approved, and of maintaining approval if and when changes were made to scheme rules.”
43. He ended by stating that it was not part of the Additional Party’s pensions function to resolve any disputes between scheme members and the pension provider. The Additional Party’s practice is to inform the scheme member to seek assistance from the Pensions Advisory Service or to contact the Financial Services Authority.

44. This evidence has not been challenged by the Appellant. Even if it were, the Tribunal would accept it without reservation. The Appellant is simply in no position to challenge a description of this “pensions function” carried out by the Additional Party.
45. The only evidence put in by the Appellant is a written statement dated 3 February 2008. This was done pursuant to directions issued by the Tribunal which made it quite clear that any witness statements should deal with questions of fact and not argument or opinion.
46. At page 4 of his witness statement, the Appellant revisits the question of consent for the purposes of section 18(2)(h) of the 2005 Act claiming that a letter dated 5 March 2007 sent to the Additional Party constitutes such consent. Reliance is also placed on the provisions of the exception contained in section 18(2)(c) of the 2005 Act and he ends by referring to his “proposed civil court action” against Scottish Mutual to justify reliance upon that provision.

The Issues

47. The Tribunal respectfully agrees that overall there are six principal issues that need to be considered. The Additional Party suggested a seventh but as there are reasons for the Tribunal viewing this issue as not being necessary to arrive at a determination of this Appeal, it will mention this ground below at paragraph 70, but not deal with it.
48. The first question is one already referred to above. This is whether the request made by the Appellant is a proper request for information within FOIA. The second question is whether any information sought which properly fell to be a legitimate request under FOIA was held in relation to the “functions” of the Additional Party. The third question is what constitutes a “person” for the purposes of section 23 of the 2005 Act. The fourth question is whether the provisions of section 23 would be satisfied in the sense that the information sought would not only relate to a person but would by means of its release enable the identity of that person to be specified or deduced. The fifth question is whether in considering the prohibition against disclosure in section 18(1) of the 2005 Act, any account should be taken of the exceptions under section 18(2). The sixth question is if section 18(2) is applicable, whether any exceptions listed, particularly those highlighted above, namely sections 18(2)(c) and (h), are applicable.
49. The Tribunal notes that save with regard to the fifth question there is common ground as to the submissions made on the part of both the Commissioner and of the Additional Party.
50. As can be seen from the decision this Tribunal has reached with regard to dismissal of the Appeal, there is no strict need for the Tribunal to resolve the different arguments put forward by those parties with regard to the fifth issue. However, with the possibility of

- there being further appeals in this area, the Tribunal has felt it appropriate to address the arguments which have been carefully submitted as to this issue by those two parties. The Tribunal naturally accepts that any conclusion in this matter will not serve as a binding precedent in future Tribunal decisions.
51. The seventh question which the Tribunal proposes not to address is the following, namely whether if section 18(1) of the 2005 Act and section 44 of FOIA are properly engaged, there remains a duty to confirm or deny what information is held; alternatively whether the exemption only entitles the public authority to withhold any information which it has confirmed that it holds. As indicated above, this issue will be revisited below at paragraph 70.
 52. As to the first issue the Tribunal respectfully agrees with the Additional Party and the Commissioner that questions 3 and 5 do not contain questions which properly fall within the ambit of FOIA. The Tribunal would add that it does not regard question 4 as constituting a proper information request under FOIA in that it seeks an interpretation of the approved Deed of Trust and Standard Provisions. These matters are mentioned by way of completeness only, since if as the Tribunal finds in agreement with the principal contentions made by the Commissioner and the Additional Party that section 44 of FOIA applies, the precise characterisation of these and perhaps other questions remains academic on the facts of this case.
 53. With regard to the second issue and the question of the functions of the Additional Party, there can be no doubt on the evidence before the Tribunal (as indeed was the case before the Commissioner) that one of the functions of the Additional Party was to approve pension schemes, the so called pensions functions referred to by Mr Rounding in his witness statement. The Tribunal notes that in any event this point does not seem to be in issue either seriously or at all given the so called "adjustments" that the Appellant has filed.
 54. The third issue concerns the definition of a "person" for the purposes of section 23 of the 2005 Act. This point again appears not to be in dispute on the part of the Appellant but in any event it is quite clear in the Tribunal's view that the term "person" includes both natural and legal persons as is made clear by the Explanatory Notes to the 2005 Act.
 55. This leads to the next question whether the information sought would relate to a person and whether releasing it would cause that identity to be specified or enable it to be deduced. This point is reflected in paragraph 56 of the Decision Notice, and from the Tribunal's reading of the various exchanges between the parties, does not appear to be disputed by the Appellant.

56. As the Additional Party has pointed out in its written submissions, the contention made by the Appellant that the Scottish Mutual has consented to disclosure does not bear upon this particular issue. The Tribunal respectfully agrees with the Additional Party that to the extent that the Appellant “denies” that section 18(1) is engaged, this appears to be because, as he has asserted on more than one occasion, the exceptions as contained in sections 18(1)(c) and (h) are otherwise applicable.
57. The next and fifth issue is one which has caused a divergence of view in the arguments propounded by the Additional Party and by the Commissioner.
58. The Additional Party claims that the effect of section 23(1) when read together with section 18(1) of the 2005 Act is such that once the latter section is engaged and the conditions prescribed in that section are satisfied (ie information relating to a person and the fact of disclosure identifying the person or enabling that person’s identity to be deduced) this will lead inexorably to the conclusion that the information remains exempt from disclosure under section 44 of FOIA. It follows according to the Additional Party that the exceptions under section 18(2) are thereby rendered irrelevant.
59. For the purposes of its submissions the Additional Party relies primarily on the effect of section 23(1) of the 2005 Act. It submits that sections 23(1) and (2) refer only to section 18(1) and not to section 18(2). Reliance is also placed upon the relevant Hansard debates where the sponsoring Minister had in the relevant entry on 26 January 2005 (column 395) attached “paramount importance” to the notion of taxpayer confidentiality. It is fair to say, however, that the words of the sponsoring Minister are in general terms only. There is certainly no discussion in the Minister’s statement as to the precise interaction between the various provisions within the 2005 Act, in particular as between section 18(1) and 18(2).
60. The Additional Party also stresses the nature of the content of the various exceptions in section 18(2) characterising them as “generally made in pursuance of a discretion possessed by” the Additional Party. It is submitted that this discretionary structure is at odds with the structure of FOIA which imposes a duty to disclose and that to allow any of the exceptions set out in section 18(2) to have any effect would be tantamount to transforming what are called “the permissive” provisions of section 18(2)(a)-(d) and (f)-(h) into an “obligation to disclose” provided only that the case fell within one of the potential exceptions to the overall duty of confidence.
61. In supplemental written submissions provided by the Additional Party two further arguments are made. First, it is contended contrary to a suggestion made by the Commissioner in his written submissions, that no reliance can satisfactorily be placed on section 40 of FOIA or indeed upon any other of the exemptions in FOIA. Moreover,

- reverting to the question of discretion built into many of the exceptions under section 18(2) of the 2005 Act, the Additional Party states that were section 18(2) to be considered it would not be for the Commissioner, or indeed this Tribunal, to decide whether or not the Additional Party, albeit on the facts of another case before it, should have decided that the conditions for the exercise of its discretion were fulfilled.
62. In this latter regard the Additional Party refers to a very recent decision of the Tribunal, namely *John Hoyte v Information Commissioner and the Civil Aviation Authority* (EA/2007/0101) in which the Tribunal considered the application of section 44 of FOIA in the context of a prohibition against disclosure contained in section 23 of the Civil Aviation Act 1982.
63. The Additional Party seeks to draw a parallel between the provisions contained in the *Hoyte* decision and those appearing in section 18 of the 2005 Act. It freely admits however that the Civil Aviation Act 1982 does not on its face contain any equivalent to section 23(1) of the 2005 Act. In the words of the Additional Party's written submissions: "... the case does not cast any light on the issue of whether or not regard should be had to s.18(2) when deciding whether or not the prohibitions in s.18(a) [of the 2005] Act apply." Reliance is placed on the *Hoyte* decision by way of analogy only.
64. In detailed written submissions submitted on behalf of the Commissioner, it is contended that it is not possible without reference to section 18(2) to determine whether or not section 18(1) is engaged in respect of any particular information, and in any event, prohibition on disclosure under section 18(1) does not of itself mean that information is exempt under section 44 of FOIA. That latter consideration depends on section 23 of the 2005 Act. The Commissioner submits that although section 23(1) refers to information relating to a person "... the disclosure of which is prohibited by s.18(1) ...", that simply means information that is prohibited from disclosure pursuant to a proper application of section 18(1). There can be no disregarding of section 18(2) in such circumstances. Moreover, section 23 of the 2005 Act expressly specifies the type of prohibited information that would be exempt under section 44 of FOIA, as well as that type of information which will not be so prohibited. It follows that the exemption under 44 of FOIA will only be engaged where, first the information is held in connection with a function of the Additional Party, secondly, where none of the exceptions in section 18(2) apply, third, where the information relates to a person as that expression is defined, and lastly, where the requirements of section 23(1) are duly satisfied.
65. The Tribunal feels that on balance the arguments of the Commissioner are to be preferred. First, the Tribunal finds it difficult to find any ambiguity on the face of section 18(1) and section 18(2) of the 2005 Act such as to import the necessity to have recourse to Hansard under the well known principles considered in *Pepper v Hart*. The language

of the relevant provisions in the 2005 Act is clear. It is simply not possible to determine whether or not section 18(1) is engaged without reference to section 18(2). Moreover, on a clear reading of the statute, in the Tribunal's view, it is only if the information is such that none of the exceptions in section 18(2) apply that it can be said that section 18(1) is fully engaged and that the information may not be disclosed. Next and perhaps crucially, section 18(1) whether or not coupled with section 18(2) does not represent a complete code whereby the question as to whether disclosure should be made can be answered. As the Additional Party itself accepts, whether information prohibited from disclosure under section 18(1) is in fact exempt depends on section 23. As a matter of statutory construction, therefore, the Tribunal finds that in the absence of clear words which would expressly distance the operation of section 18(2) from section 18(1) such as to make section 18(1) a complete code in the way suggested, it is necessary to consider whether any of the exceptions in section 18(2) apply before an answer can be given to the question of whether disclosure is prohibited under section 18(1).

66. As indicated above even if the passage in Hansard were to be had recourse to, the Tribunal does not find that anything in the passage quoted necessarily leads to the conclusion that the reading propounded by the Additional Party should apply. In the Tribunal's view, section 23 has the effect of restricting the application of section 44 of FOIA only to information relating to persons in the way contended for by the Commissioner.
67. Reverting to the further submissions made by the Additional Party on this issue although it is true that many of the exceptions contained in section 18(2) connote the exercise of a discretion by the Additional Party that characterisation is by no means applicable to all the exceptions.
68. No doubt as a general matter the Commissioner would need to be satisfied that the exceptions have been properly applied but this Tribunal is not prepared to enter into any speculation as to those circumstances in which that examination may be required and the extent to which any such examination should go. As the Additional Party itself recognises, in some if not in many of the exceptions, and in the particular case of individuals there could be a potential breach or breaches of Human Rights legislation such as Article 8 of the European Convention on Human Rights.
69. The sixth and final issue mentioned above concerns a finding as to whether on the basis that section 18(2) is relevant, any of the exceptions listed are applicable. From what has been said above, it is abundantly clear in the Tribunal's view that section 18(2)(c) is not engaged given the fact that the no civil proceedings were on foot either at the date of the request, or as at the date of the determination of this Appeal, so far as this Tribunal is aware. As to the question of consent, the Tribunal again respectfully agrees with both

the Additional Party and the Commissioner that as at the date of the request no such consent was in existence.

70. The Tribunal finally wishes to revert to the question already raised by the Additional Party and referred to above at paragraph 51. The Additional Party has submitted that the effect of sections 1, 2 and 44 of FOIA prohibit not only the disclosure of the information sought by the Appellant but also the disclosure of whether or not any information was held by the Additional Party at all. It is therefore contended that the proper response to the Additional Party should have been to refuse to confirm or deny whether it had received information from Scottish Mutual. This Tribunal is not concerned with that possibility and indeed is fortified in this respect by its finding that the Decision Notice did not contain any error in law for the reasons above stated.

71. For all the above reasons the Tribunal dismisses this Appeal.

Signed

David Marks

Deputy Chairman

Date: 22 April 2008